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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 322

GEORGE E. SHIBLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. 1–5; R. C. 709–712 [1]) has not yet been reported. The certificate of contempt entered by the district judge (R. C. 670–685) is annexed as an Appendix, *infra*, pp. 1a–16a.

[1] The designation "R. C." refers to the record of orders and documents certified by the clerk of the Court of Appeals.

The designation "R." refers to the reporter's transcript of testimony, in 21 volumes. The first volume of the transcript will be referred to as "Vol. A" since its pagination commencing with page 1 is repeated in the next volume. The remaining volumes proceed in consecutive pagination and are therefore referred to only by page and not by volume.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, p. 6; R. C. 713) was entered on June 18, 1956. On July 9, 1956, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to and including August 17, 1956, and the petition was filed on August 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge's holding of petitioner in contempt is sustained by the record.

2. Whether the trial judge was required to submit the issue of contempt to another judge.

3. Whether the trial judge lost jurisdiction of the summary contempt proceeding by reason of continuances for five weeks to permit transcription of portions of the extensive record, and for an additional three weeks because of petitioner's illness.

STATUTE AND RULE INVOLVED

18 U. S .C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * * * *
>
> (3) Disobedience or resistance of its lawful * * * order, rule, decree, or command.

Rule 42 (a), F. R. Crim. P., provides:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit (Pet. App. B., p. 6) affirming the judgment of the District Court for the Southern District of California holding petitioner in contempt for conduct before the District Court. Petitioner had been sentenced to imprisonment for thirty days. The Court of Appeals—because petitioner had also been convicted in another case involving criminal charges of receiving and converting a transcript of proceedings of a United States Marine Corps Court of Inquiry and of conspiracy to commit burglary in a United States building (*Shibley* v. *United States,* pending on petition in this Court, this term, No. 243), and also because several counts of the information (in the case in which the instant contempt occurred) had not yet been determined by the jury—remanded the cause to permit the trial judge to reconsider the sentence for contempt in view of these conditions (R. C. 712).

The certificate of contempt is annexed as an Appendix, *infra,* pp. 1a–16a. As noted there, the contempt proceedings followed the trial of an information

charging petitioner with refusal to answer questions before a Marine Corps Court of Inquiry which had been called to investigate charges of personal misconduct made by petitioner in a letter to the Commandant of the Corps written after petitioner had, as civilian counsel, represented one Sergeant Bennette at a trial by court-martial (see App., *infra,* p. 2a). The validity of the Court of Inquiry and its power to require testimony had been upheld prior to trial in a comprehensive opinion by Judge Yankwich. 112 F. Supp. 734. Petitioner, who had co-counsel, elected to represent himself when told that only one could participate, and, even after the court (early in the trial) changed the ruling, petitioner took a major part in the trial (App., *infra,* pp. 2a–3a). The jury was unable to arrive at a verdict on three of the six counts (Counts 4, 6, and 7) and acquitted as to the charges in the remaining three counts (R. 2558–2559).[2]

At the conclusion of the trial, on Friday afternoon, November 20, 1953, when the jury brought in its verdict, the trial judge (Judge James M. Carter) addressed the jury in review of the case. He first pointed out his own conduct in theretofore refraining from any indication of his thoughts, but stated that, now that the case was over, he considered the verdict "a miscarriage of justice" (R. 2559). He said that the case was a simple one, involving specific factual

[2] With respect to three of the original nine counts of the information (Counts 3, 8, and 9), the government elected not to offer evidence, and acquittal was granted by the court. The remaining six counts charged refusals to answer specific questions before the Court of Inquiry (App. 2a).

issues, which he thereupon reviewed (R. 2559–2560). He continued (R. 2560–2561):

> Some of you people have had no previous jury experience, and I know the case took longer than it probably should have, there were interruptions from time to time, but I should also tell you this, which of course you don't know: On a verdict of acquittal the Government has no appeal, and that is the end of the case on the counts on which there has been an acquittal. If the defendant is convicted, of course the defendant has an appeal. So that is the end of the counts on which you have returned a verdict. And I tell you that the issue, after all the smoke was blown away, was a relatively simple issue, and if jurors in cases like this bring in this kind of verdict, the Government might well save its money in trying cases involving the United States before juries.
>
> The fact that I disagree with you, however, does not indicate that I have any hard feelings against you. People's minds differ. There may be things that I know that you do not know. I suppose there might be a dozen or fifty explanations. We will not worry about that particular matter.
>
> The court wants to thank you for your patience and your service in the case, and in a moment we will excuse you. In fact, I now excuse you, but I suggest you remain in your seats for just a moment. [R. 2560–2561.]

The judge then referred to the fact that petitioner had accused Marine Corps officers of perjury, had accused the government attorney of dishonesty, and

had accused the judge of slanting the reading of instructions. The judge also referred to petitioner's repetitiousness and to his general conduct "in a way ill fitting a lawyer in this court," and directed petitioner to return on Monday morning when the matter of summary contempt would be taken up (R. 2561–2562).

The judge thereafter continued the matter of contempt until December 7 and then to December 28, 1953, in order to await the transcription of certain portions of the record by the reporter, the total transcript consisting of over 2,800 pages (R. 2566, 2575, 2580).

On December 28, petitioner requested a continuance on account of illness, and the matter went over to January 18, 1954 (R. 2584–2585), on which date the judge filed his certificate of contempt, and sentenced petitioner to 30 days' imprisonment (R. 2587–2592).

The certificate of contempt consists of 16 sections. As background, the second section sets forth in detail that, despite the prior ruling of Judge Yankwich, and despite the admonitions of the trial judge, petitioner and his co-counsel continued to make lengthy oral motions on points which had previously been ruled upon, thereby unduly extending the trial.[3] The specifications

[3] Petitioner's statement (Pet. App. 10) that the first eight days of the trial were consumed by the prosecution's case fails to mention the fact that most of the time was taken up by his motions and cross-examination, the nature of which is illustrated by the subsequent discussion in the text. The government called three witnesses to identify the record (R. 379, 625) and to prove the service of a subpoena upon petitioner (R. 789).

of contempt are set forth in paragraphs 4–14 of the certificate. Due to the length of the record, we do not undertake to discuss all of the specifications in detail, deeming it sufficient merely to document the pages of the record to which some of the specifications refer.

1. The fourth section of the certificate relates to petitioner's constant practice of making oral motions on points which had previously been ruled upon, the court noting that the nature and extent of such conduct could be appreciated only in relation to the entire record (App. *infra*, p. 9a). Within the limits of a brief in opposition to a petition for certiorari, we can do no more than suggest the type of conduct to which the judge was referring:—

a. The first witness called by the government was for the purpose of identifying the transcript of the record of the Court of Inquiry (see R. 379–381). The witness explained the manner in which the transcription was made from voice recordings (R. 389). In the course of a lengthy cross-examination, petitioner called attention to the fact that the transcript bore a notation of the hours at which the court opened and closed and asked whether the voice of the president of the Court of Inquiry was recorded making such statement (R. 477, 479). The District Court pointed out that the matter was immaterial (R. 478), stating that, while it was permitting petitioner to go into questions concerning the correctness of the record, the fact that some recorder wrote down the time was immaterial (R. 479). Thereafter, after further lengthy cross-examination

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of the witness, under the court's ruling that petitioner could inquire into bias (see R. 557–558), petitioner, out of the presence of the jury, asked for the production of the phonographic belts (R. 560). Petitioner said that he intended to show discrepancies from the belts (R. 562), and the court ruled that it would hear counsel as to what the correct record should be as to the questions asked of petitioner, his objections, etc., but that it was not going to go into matters concerning other witnesses at the Court of Inquiry (R. 564). When asked to be specific, petitioner again pointed to the failure of the recordings to contain the notation as to the court closing (R. 569) and the court ruled that this was immaterial (R. 569).

Thereafter, the sergeant who had taken the recordings testified (R. 625 *ff*), *inter alia*, that he turned the machine off when the court recessed, even if, as happened on some occasions, the president did not make an oral announcement (R. 630). During a recess in this witness' testimony, counsel for the government called to the attention of the trial court the fact that petitioner had served a subpoena duces tecum for the belts relating to the Bennette pretrial investigation and court-martial, as well as all belts, machinery and apparatus used at the Court of Inquiry (R. 637–638, 640). The court ascertained that the machine was both heavy and sensitive (R. 646) and quashed the subpoena as to the machinery until there was some showing that it was necessary (R. 649). It directed production of the belts as to the Court of Inquiry and quashed the subpoena

as directed to the Bennette trial on the basis of its earlier ruling (R. 649–650).

The next day, the sergeant who had previously been on the stand testtified that at each recess and opening of the Court of Inquiry he recorded the time on a pad and, when he transcribed the record, added the time (R. 674). Petitioner opened his cross-examination of tthe witness by asking if all the officers in the room were not his superiors (R. 677–679), and whether he recalled as the recorder that one of the chargess against Bennette was willful disobedience of the orrder of a superior officer (R. 681). He then asked that the officers be excused while the sergeant was ttestifying (R. 682).

After cross-examinattion of the witness as to just where he was sitting, how the machine operated, etc. (R. 686–726), petitioner handed the sergeant a paper which the witness admmitted was in his handwriting, reading "4th day Open—1000" "not on roll check" (R. 727–729). The witness explained that this meant that the president hadd opened the court before the switch had been turned on, but that he could not be sure whether it was at the Bennette trial or the Court of Inquiry (R. 730). At this point court adjourned, and after the jury had been excused, the court stated to petitioner that, since he had expressed himself as unfamiliar with federaal procedure, the court thought it was its duty to warrn petitioner that he was building up a tremendous record on matters which were at best barely relevannt (R. 731–732). When court reconvened, and petitioner was asked what he ex-

pected to prove by the paper, he said that it would show that the opening was not recorded on the record (R. 752–753). The court again reminded counsel that it had ruled that this issue was immaterial (R. 753–756). Later, in cross-examination of a government witness, petitioner went into the matter again (R. 1736–1738).[4]

b. Early in the course of the trial, the judge admonished petitioner that the Bennette case was not to be retried in the instant proceeding. The judge stated, "You may allude briefly to that case for the purpose of background, but we are not going to try the Bennette case in this court" (R. 150). Similarly, the judge admonished petitioner against attempts to inject into the instant trial the personal charges made in the letter to the Commandant of the Marine Corps at a time prior to the convocation of the Court of Inquiry.[5] Nevertheless, the judge had frequent occasion to repeat these admonitions (R. 152, 154, 156–160,

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[4] Petitioner, in defense, was allowed to testify that from his recollection, as refreshed by the tapes, there were inaccuracies in the transcript. He was allowed to testify to alleged statements after adjournment or recess (R. 1225–1325; see R. 1200–1201, 1223–1224).

[5] "We are not going to try your charges made in your letter, either, Mr. Shibley. The issues before this jury will be: was there a Court of Inquiry called that had jurisdiction? Were you subpoenaed to appear before that court? Were you asked certain questions, which you refused to answer, and were you ordered or directed to answer the questions, and did you do so unlawfully? Therefore, we are not concerned with whether the statements you made were true or false, generally speaking, nor are we concerned with whether you can prove them, because we are not trying General Megee or Colonel Endeweiss in this case" (R. 152).

163, 557–558, 615, 650, 826, 1822). As noted above, petitioner endeavored, in the midst of trial, to subpoena the record of the Bennette court-martial (R. 650).

2. The fifth section of the contempt certificate (App., *infra*, pp. 9a–10a) states that on Octoer 29, 1953, toward the end of the trial day, petitioner deliberately delayed the proceedings, by stating and withdrawing questions, looking at the clock, and indulging in long and irrelevant argument, and then engaged in an emotional scene before the jury which virtually compelled the judge to adjourn the proceedings for the day. The incident to which the judge refers appears at pages 793–808 of the record:

The third witness for the government was the colonel who had served a subpoena upon petitioner (R. 789). After he had testified to service of the subpoena, the government attorney also asked him to identify his signature on Exhibit 1–A, the transcript of the testimony at the Court of Inquiry (R. 792), the accuracy of which had been the subject of days of cross-examination as described above. Petitioner asked that admission of the subpoena and return be deferred until the next morning when his co-counsel, who had been excused, would be present, and the court directed the United States Attorney to offer the exhibit in the morning (R. 793).

Petitioner stated, however, that he wished to examine the witness at that time (R. 793). On cross-examination, petitioner asked the witness whether his signature on that transcript was a certification that

it was true and correct (R. 794). At that point the court said that it was not going to open up for cross-examination that entire line and would entertain a motion to strike the questions relating to the signature on the transcript (R. 794–795). The court made it clear, however, that its ruling went merely to the transcript, and that the rest of the testimony of the witness remained (R. 795). After that ruling, petitioner continued his cross-examination, asking such questions as in what building the subpoena had been prepared (R. 799), and the name of the staff legal officer at that time (R. 802). The court said it would continue until cross-examination was completed, stating that petitioner could have as much time as he wanted (R. 802). Petitioner then referred to his physical condition, his lack of sleep, and the absence of his attorney (R. 802). The court pointed out that the direct examination was very short and that in the morning, if counsel wanted to take up other matters, the witness would be available. He directed the jury to draw no inference from his remarks in directing petitioner to proceed, noted that there had already been some cross-examination and his belief that the matter could be concluded by five o'clock. Petitioner then said (R. 804):

> Your Honor, I am not prepared to proceed. And if I must forego my cross-examination, I don't consent to it, but I must your Honor.

In its certificate of contempt, the court describes petitioner's demeanor in these colloquies as "an emotional scene" (App., *infra*, p. 10a).

After the jury had been excused, the judge pointed out that he had "tried to extend" to petitioner the "limits of cross-examination," that he believed everyone was entitled to his day in court, but that in his opinion petitioner was not doing himself any good (R. 805). He noted that while petitioner was cross-examining he was observing the clock and apparently stalling; that co-counsel had been excused with petitioner's consent; and that, with co-counsel present, petitioner had undertaken to conduct most of the defense himself (R. 806–807).

3. The sixth section of the certificate (App. *infra,* pp. 10a–11a) deals with petitioner's conduct arising from the judge's suggestion, out of the presence of the jury, that certain Marine Corps officers observed in the courtroom and known to the judge to be lawyers might wish to attend an open session in chambers where the instructions for the jury were to be discussed. This incident, in full (R. 1809–1812), is as follows:

> Mr. SHIBLEY. Now, your Honor, I would appreciate your Honor letting me state my case.
>
> I must assign, your Honor, as misconduct your Honor's constant aid of the prosecution. Something came to my attention that I do wish to make a record of.
>
> The COURT. Mr. Shibley, proceed.
>
> Mr. SHIBLEY. At this time, it having come to my attention last night, having been told by my client, I do wish to assign as misconduct and evidence of prejudice in this case what I am informed took place the other day in the discussion of instructions.

I am informed that your Honor came out here, called Mr. Marshall and Mr. Deutz, and invited these witnesses, these officer witnesses from the Marine Corps, who are really adverse to the defendant, in, saying, "Well, you are lawyers, come in."

The COURT. It is an open session of court held in chambers.

Mr. SHIBLEY. I wish to conclude my assignment, your Honor. That your Honor—that my client Master Sergeant Bennette was standing around, and that he certainly has a definite interest in my fate, since if I lose he may expect to be racked, to use Marine Corps language, and that your Honor made no extension of any courtesy or invitation to him, or to my secretary, who has been keeping notes for us. And I do wish to assign that, your Honor, along with your Honor's general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witness, and unequal treatment——

The COURT. Mr. Shibley, I consider you being contemptuous of this court. Proceed with any offer of proof that you want to make.

When a jury is here, and you are representing yourself as a lawyer, as it were, for yourself, then this court is under a handicap, because you don't have to comply with the rules that a lawyer would have to comply with, because you are the defendant. But there is no jury here present now.

Now, I take it these matters that you have been going on at length about, some of them

may be matters which you can have a right to make a record on, and some not. Now, you will confine—you are a lawyer—out of the presence of the jury, you will confine yourself to those remarks that are lawyerlike objections, and refrain from matters that aren't lawyerlike.

Mr. SHIBLEY. May I ask if it is your Honor's direction that I am not permitted to assign these things?

The COURT. You may assign such matters that you contend are misconduct that you think are proper, and which are made in a lawyerlike manner.

Proceed.

Mr. SHIBLEY. May I just say, your Honor, that I contend that these matters are matters to which I may make an assignment.

The COURT. All right. No. 1. Certainly, the settlement of instructions in a case, which are held in an open hearing, although it is held in chambers, it is not some thing that you can complain about. And there was no record made. Mr. Marshall was present. There was no request that your secretary be admitted. She would have been admitted if she had asked. The fact that we held them in chambers was no different than holding them here in the court room, except we were all a little more at ease. And there was no record then made by Mr. Marshall, nor was request made for the presence of any other persons. And it therefore cannot now be made by you as an assignment of error. So I won't hear you any further on that.

4. The seventh and eight sections (App., *infra*, p. 11a) deal with occasions on which petitioner accused the judge of "serious judicial misconduct and indicating a serious bias and prejudice against [petitioner], and a serious bias and prejudice in helping Mr. Deutz [the government attorney]" (R. 2320, see also R. 2316). Petitioner also asserted (R. 2320):

> * * * I also wish to assign as misconduct something * * * that you apparently said on the record when I wasn't listening: that Mr. Deutz was appointed by you to the U. S. Attorney's office when you were the United States Attorney. And I assign your Honor's constant interference with the defense, in aid of the prosecution, and constant failure to protect the defendant in this case from the sort of things that were said here, as being serious misconduct * * *.

The remark referred to was made by the judge in overruling the government's attempt to keep from the jury the fact that petitioner had been brought back before the Court of Inquiry by armed guard (R. 1423–1427). The court said to the government trial attorney (R. 1428):

> * * * I have a high regard for you, I hired you to work for me—this is your first criminal case, and you will discover the trials of criminal cases aren't like the trials of civil actions, if you haven't discovered it already. I don't see how you can escape having at least a stipulation, or, if not a stipulation, minimum testimony, that there was an arrest and transportation to the Marine base.

5. The ninth section (App., *infra,* pp. 11a–12a) holds improper petitioner's language upon the occasion of the judge's objection to a second request of petitioner for a recess within 20 minutes of an earlier one. It appears at R. 2322.

6. The tenth section (App., *infra,* pp. 12a–13a) concerns petitioner's repeated arguments before the jury as to the truth or falsity of his own general charges against the Marine Corps, despite the judge's admonitions to remain within the issues of the instant trial (R. 2290, 2300, 2303–2306).

Petitioner endeavored to justify his remarks by pointing out that the government attorney had called him a liar (R. 2303). The court noted that it had instructed the jury to disregard the remarks and that the truth of the charges was not in issue (R. 2303). At petitioner's request, the portion of the record involved was re-read out of the presence of the jury (R. 2305–2307). That showed that the court had objected, even before petitioner had, to the government attorney's remark and asked the jury to disregard it (R. 2274–2275, 2308–2309); that, when the government attorney had said that petitioner had put his credibility in issue, the court had replied that that was true but "that still does not mean that you may go into the question of the truth or lack of truth on these matters concerning charges at the base" (R. 2275, 2310). The court had then specifically instructed the jury that the court-martial of Bennette and petitioner's charges were not in issue (R. 2277, 2311).

7. The twelfth section (App., *infra,* pp. 13a–14a) deals with petitioner's repetitiousness in making objections and taking exceptions after the judge had ruled (R. 2537–2539, 2542–2545).

8. The thirteenth section (App., *infra,* p. 14a) holds contemptuous, as pointed out by the judge at the time of occurrence, an accusation by petitioner that the judge was speaking angrily and looking at petitioner "in what appears to be a malevolent and angry way" (R. 2544–2545).

9. The fourteenth section (App. *infra,* pp. 14a–15a) finds an assignment of error by petitioner to be frivolous to the degree of contempt; *i. e.,* petitioner's accusation that an attempt to "further impress or put pressure upon this jury to find some sort of verdict against this defendant" was involved in the taking of seats at the counsel table by the United States Attorney and an assistant when the jury returned for further instructions (R. 2547–2549).

Upon appeal, the Court of Appeals affirmed the conviction of contempt, stating (Pet. App. A, p. 2–3):

> The record bears out the statements of the certificate in essential particulars. The evidence was amply sufficient to sustain the charges.
>
> * * * [Petitioner] consistently spoke and acted with complete contempt of the court. He attempted to and fairly succeeded in taking complete control of the trial, because of the attempt of the trial judge to act as an impartial arbiter and because the trial judge refrained

from criticizing the conduct of [petitioner] before the jury as far as possible. Specifically, [petitioner] continuously and contrary to the rulings and directions of the judge, insisted on bringing before the trial jury, in opening statement and other places during presentation of evidence and in final arguments, the merits of the case * * * before a Marine Corps court-martial, charges which [petitioner] had made against Marine Corps officers on which the Court of Inquiry had been convened, and constantly ignored directions and rulings of the court.

* * * * *

Many of the recitals of the certificate might not state specific acts which were of themselves contemptuous, but they give color and emphasize the necessity of the judgment as to the particulars of conduct recited.

* * * * *

* * * If there is a conviction, then a subsequent penalty for contempt appears to the unthinking as a cumulative and vindictive punishment. But where there is a verdict of "not guilty", as in this case, the charge can always be made, as it has by the lawyer defendant here, that the trial judge was disappointed at the verdict and therefore assessed a punishment for contempt. But the record here, cold as it is, is replete with evidence of such utterly contemptuous conduct that a trial judge would have been recreant to his duty if he had failed to notice the assault upon the dignity of the tribunal, whatever the verdict were. * * *

The Court of Appeals characterized petitioner's conduct as a "cold, consistent, calculated design to influence the jury by extraneous matter," and said (Pet. App. A, p. 4):

> * * * This lawyer defendant is brazenly citing the success of his contempuous behavior as a reason for relieving him of its consequences.

With respect to petitioner's contention that the trial judge was not the proper judge to enter the certificate of contempt after expressing his opinion of the jury's verdict, the Court of Appeals held (Pet. App. A, p. 4):

> * * * The trial judge, throughout the trial, exercised admirable self restraint before the jury. He would have had a perfect right to comment on the evidence during instruction if he did so fairly. The fact that he did not and refrained from an expression to the jury of the conduct of defendant during the trial may have resulted in this result which he thought unjust. He had a right to say he thought so. There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the Court of Inquiry and before him. * * *

ARGUMENT

1. The contention (Pet. 26–29) that petitioner's conduct was not contemptuous is, we think, amply answered even by the necessarily incomplete summary of his conduct set forth in the Statement, *supra,* pp. 6–18, and even without the nuances of voice and manner which the trial judge observed but which the rec-

ord cannot reflect. If there were nothing else in this record—and there is in fact a great deal more—the finding of contempt is justified by the manner in which petitioner registered his objection to the fact that the court invited Marine Corps officer defendants to the open hearing in chambers on the settling of instructions. It was possible, as the temperate language in the present petition for certiorari shows, to have preserved an objection without reaching the offensiveness of accusations of a "general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass of the Marine Corps." See the Statement, *supra*, p. 14. Despite the warning to petitioner that he was not making his objections in a lawyerlike manner and that he was being contemptuous (see the Statement, *supra* p. 14), petitioner and his co-counsel continued to make similar accusations in an equally offensive manner (see the Statement, *supra*, pp. 16, 18; R. 2316–2317, 2320, 2471–2472; and see R. 2520–2526). From the record, the conclusion is warranted that petitioner was deliberately laying a convenient and irresponsible groundwork for a contention, should the verdict be against him, that the judge was biased. He also seems to have been attempting to provoke the judge by calculated affronts and refusals to abide by court rulings. A trial judge would have done no service to the cause of judicial order and dignity if he allowed such deliberate, calculated effrontery to pass unrebuked.[6]

[6] As the judge pointed out in passing sentence, petitioner showed, in arguing against imposition of sentence, that he was capable of

2. The argument that the judge had become too involved to be able to rule on the contempt (Pet. 20–23) is also fully answered by the record which, as the Court of Appeals held, shows that throughout the trial the judge had "exercised admirable restraint before the jury" (Pet. App. A, p. 4). The whole record establishes that, despite petitioner's provocations, the trial judge conducted the proceedings with judicious impartiality, taking great pains to make certain that petitioner had a fair trial and ample opportunity to present any valid defenses he might have.

Petitioner's truncated quotations from the record (Pet. 8–13) present an incomplete picture. In themselves, however, these remarks reveal none of the bias which petitioner attempts to inject into them. The first quotation (Pet. 8, A) was a reasonable explanation of the court's legal ruling on a legal issue. The second (Pet. 8, B,) is in fact a good illustration of

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"a courteous and lawyerlike presentation" (R. 2597). The judge also noted that he had taken into account petitioner's emotional involvement in the case and had advised him to let co-counsel conduct the case (R. 2599). But the judge did say, "I don't recall of a case in which, either in dealing with prosecutors when I defended cases, or in trying cases when I was a lawyer, or while I sat on the bench, that a lawyer has conducted himself as you did in this courtroom" (R. 2598). And he added: "The fact that you and I were acquainted, you say friends, doesn't enter into the matter. I am not proposing to sentence you because I dislike you. I am proposing to sentence you because if lawsuits were permitted to be conducted as you attempted to conduct a lawsuit in this court, you wouldn't have the administration of justice, you wouldn't have adequate trials, you wouldn't have time to take care of the court's business, you wouldn't have fair verdicts, the process of justice would be made a farce" (R. 2598).

* * * * *

the manner in which the judge did deal with petitioner. The judge was hearing testimony *out of the presence of the jury* on the issue of the jurisdiction of the Court of Inquiry, and, when petitioner objected to the use of a certified copy of the transcript, the judge said that he would take the original. The third quotation (Pet. 8–9, C) must be considered in relation to its background. At the opening of trial, on October 20, petitioner had, in his own words, "handed to the court what started to be a section of a brief which was never completed" (R. 193–194). The next day, when argument ensued as to whether the court would consider itself bound by Judge Yankwich's ruling on the motion to dismiss (R. 194–206), petitioner asked for a recess, saying "This comes as, rather, not a shock to me, I wouldn't say, but I wasn't prepared for it this morning, just as I wasn't prepared to argue yesterday morning before you" (R. 206). There was still further argument as to matters alleged not to be covered by the ruling, the judge excused the jury (R. 206–226), and the rest of that day was consumed in argument. Under these circumstances, when the judge, the next day, responded with a touch of irony to petitioner's request for leave to hand in incomplete memoranda (R. 373), it can hardly be said that the judge was displaying bias.

A good example of petitioner's incomplete presentation of the record is incident numbered G (Pet. 10–11). Petitioner fails to state that the judge's question (during argument *out of the presence of the jury* on the admissibility of evidence) as to the person to

whom he was making a speech was preceded by a statement by petitioner that alleged omissions from the record of the Court of Inquiry showed "a court so covered and filled with dirt and corruption * * * a court so saturated with tyranny and corruption and dishonesty, that it could not conduct a fair, decent or impartial hearing" (R. 1821); and that petitioner had referred to a rule "in the United States under the Stars and Stripes and our constitutional form of government" (R. 1822).

Incidents D (Pet. 9), I (Pet. 11–12), J (Pet. 12) and other alleged examples cited at pages 12 to 13 of the petition are all matters discussed in the certificate of contempt. See the Statement, *supra,* pp. 11–12, 18. It does not show bias for the judge to call contemptuous conduct contempt. How little the judge allowed petitioner's personal attacks upon him to affect the conduct of the trial is illustrated by an incident, which petitioner does not choose to cite, appearing at pages 1690 to 1697 of the record. Petitioner during a recess, after he had been on the stand, had accused the judge of a series of grimaces which could only have the effect of making the jury believe there was something unethical about his conduct (R. 1691). The court disclaimed any such intention (R. 1692). When the jury reconvened, the judge not only charged the jury, as he had told them on many previous occasions, that they were to disregard the remarks of the court; he not only said, "I am not a particularly pleasant thing to look at, but I haven't intended to grimace or scowl

or to indicate displeasure with either the defendant or his attorney or with the Government or its attorney"; but he went on at that point to charge on the presumption of innocence and function of the jury to determine the facts (R. 1696–1697). Note should also be taken, on the question of personal involvement, of the good-humored manner in which, toward the very end of the trial, after the defense had argued its case until closing time on November 18, the judge agreed to give the defense an extra ten minutes to present its case on the defense protestation that the next morning only the government's version would be before the jury (R. 2361–2367). And, in this connection, it should be borne in mind that while, on the two occasions cited by petitioner, Incident F (Pet. 10), and Incident I (Pet. 11), the judge, out of the presence of the jury, expressed the view that petitioner had behaved improperly before the Court of Inquiry, he completely refrained from giving any intimations of his opinion in his charge to the jury.

Petitioner's quotation from the judge's statement to the jury after the verdict (Pet. 3), a fuller portion of which is set forth in the Statement, *supra,* p. 5, again gives it a coloration which the full text (R. 2559–2561) belies. While the judge, after the whole case was over, made it clear that he did not agree with the jury's verdict, he also made it clear that he recognized that "people's minds differ" (R. 2561). The judge's statement to petitioner as to his contempt indicates no origin of the contempt charges against

petitioner in a sudden disappointment with the verdict. Petitioner had been repeatedly corrected during the trial; he had twice been told directly that he was in contempt (R. 1810, 2317, 2545); and his co-counsel had also been warned that the judge "considered some of Mr. Shibley's conduct in this court contemptuous of the court" (R. 2526). Apparently, petitioner did not really believe that the judge meant what he said because the latter had so scrupulously recognized that petitioner's position as a defendant made it impossible for him to be treated as if he were an ordinary lawyer, and the judge had so carefully refrained from making an issue of petitioner's misconduct, merely telling him on several occasions—and that outside the presence of the jury—that he was in contempt.

In this case, petitioner's contention that the trial judge was not in a position to decide the matter of contempt thus becomes equivalent to the argument that, if a lawyer interlards his misconduct with sufficient personal insults against the judge, the offender may then assure himself of the delay and opportunities of yet another trial (on the contempt charge) with opportunity to pit his word and explanations and skill against the direct observations and integrity of the trial judge—even though there is, in fact, no adequate reason to believe that the trial judge did actually become so far personally involved that he should have refrained from passing on the contempt. Such an opening for skilled and contemptuous practitioners could go far to make a mockery of court procedure and dignity, and could eliminate the rule providing

for summary contempt orders (Rule 42 (a), F. R. Crim. P., *supra*, p. 3). As this Court held in *Sacher* v. *United States*, 343 U. S. 1, 11–12:

> A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. * * * *It cannot be that summary punishment* is only for such minor contempts as leave the judge indifferent and *may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]
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> * * * * *
>
> That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. * * *

Petitioner seeks to equate the instant situation to that of *Offutt* v. *United States*, 348 U. S. 11, but

exactly that conduct of the judge in *Offutt* which was the basis of the decision was scrupulously avoided by the judge in the instant case, nor was a comparable personal animosity involved. In *Offutt,* this Court referred to such incidents as:

> The COURT. Just a moment. If you say another word I will have the Marshal stick a gag in your mouth. [348 U. S. at 16, fn. 2.]
>
> * * * * *
>
> The COURT. You have forfeited your right to be treated with the courtesy that this Court extends to all members of the bar. [348 U. S. at 17, fn. 2.]

Here, as we have noted, all remarks critical of petitioner were made out of the presence of the jury and confined to brief statements; moreover these remarks were not unduly harsh in the circumstances. Beyond that, occasional irony—and that, too, out of the jury's hearing—is all that petitioner points to as showing bias. We submit that the Court of Appeals properly found that the trial judge was justified in himself punishing the contempt committed before him.

3. Petitioner complains of the lapse of time between the judge's notice to him immediately after the trial and the actual entry of the certificate of contempt and the imposition of sentence. Petitioner's complaint misconceives the nature of summary contempt and the difference between such proceedings and other types dealt with in a separate subsection of the Rule. (Compare the applicable provisions of subsection (a), *supra,* p. 3, with the provisions of subsection (b),

Rule 42, F. R. Crim. P.). As held by this Court in *Sacher* v. *United States,* 343 U. S. 1, 9–10:

> * * * "[S]ummary" as used in this Rule [42 (a)] does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submissions of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.
>
> Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power. * * *

In this case, the trial closed on Friday afternoon, November 20, 1953. The judge immediately stated—specifying some of petitioner's offenses—that the matter of summary contempt would be taken up on Monday morning, November 23. On that date, the judge continued the matter for two weeks and thereafter for an additional three weeks until at least the appropriate portions of the 2800 pages of transcript could be written up by the court reporter. There-

after, it was petitioner who asked for a continuance, due to illness; the matter was finally disposed of on January 18, 1954 (*supra*, p. 6).

Neither the date set by the judge (a postponement of five weeks) nor the later date obtained by petitioner (a total elapsed time of less than two months) affected the essential nature of the summmary aspect of the contempt, *i. e.*, the actual occurrence of the offenses before the judge himself. Petitioner suggests that the judge might have forgotten the facts during the intervening time, but it is noteworthy that in *Sacher* v. *United States, supra,* affronts occurring more than eight months before, in earlier stages of that trial (see 182 F. 2d 416, 432–433), would have been more likely to be vague in the judge's memory of that extensive record than the more recent events of this much shorter trial.

Common experience negates the possibility of any forgetfulness of the contempts by the judge, especially where the time was relatively brief and the judge, in addition, awaited the transcribing of pertinent portions of the record in order to double-check his recollection of the various offenses. Petitioner's argument virtually proposes the penalizing of the calm, careful action of a judge which is most to be encouraged in certification of contempt. The contention is contrary to the entire import of the decisions in *Sacher* v. *United States,* 343 U. S. 1, 9–10; *Offutt* v. *United States,* 348 U. S. 11, 12; *MacInnis* v. *United States,* 191 F. 2d 157, 161 (C. A. 9), certiorari denied, 342 U. S. 953.

CONCLUSION

The basic principles involved in petitioner's case have been set forth recently and extensively by this Court in *Sacher* v. *United States,* 341 U. S. 1, and *Offutt* v. *United States,* 348 U. S. 11. The Court of Appeals, in affirming the contempt conviction, clearly recognized these principles from which it did not deviate. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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